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JAMES H. MCKENNEY

No. 71.

Reply Br. of Troy & Cattell for

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed November 7, 1900.

No. 71.

UNITED STATES OF AMERICA, APPELLANTS,

vs.

EUGENE BEEBE ET AL., APPELLEES.

REPLY TO APPELLANTS' BRIEF.

AUTHORITY OF DISTRICT ATTORNEY TO ASSENT.

Apart from the discretionary powers especially conferred upon the district attorney, as recited upon page 27 of appellants' brief, to accept a judgment under certain circumstances for a less amount than that claimed by the United States, every attorney, by virtue of his office and his relation to his client, has inherent power to accept judgment or confess judgment in a pending litigated case, and by so doing to bind his client.

Wharton on Agency, 8th edition, section 585.

Denton *versus* Noyes, 6th Johnson (N. Y.), page 296.

Talbot *versus* McGee, 4th T. B. Monroe (Ky.), page 377.

In Denton *versus* Noyes, the attorney entered an appearance for a defendant who had not been served and confessed judgment. The court sustained the judgment, preserved the lien of it against real estate which had been attached, and let the defendant into a defense upon the merits. In so doing the court said:

"By licensing attorneys, the court recommend them to public confidence, and if the opposite party who has concern with the attorney, in the business of the suit, must always at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience."

AS TO LACHES.

It is argued by appellants that the Government is not to be bound either by laches of the district attorney in consenting to the judgment, nor of the officer of the Treasury in accepting the amount of the judgment, nor by the failure of the officers of the Government to move for a new trial or to annul the judgment until more than five years after the judgment had been rendered, nor by the failure of its officers to offer to refund or credit the amount of the judgment so received before filing its bill, and cites a number of cases in support of this proposition.

It is respectfully submitted that they do not appear to be in point.

Gibbons *versus* United States, 8th Wallace, 269, relates to a suit for damages against the Government arising from the action of a quartermaster of the United States Army in committing a breach of contract, and decides that the United States is not to be held liable for the "unauthorized acts of its officers, those acts being in themselves torts."

Hart *versus* United States, 95 United States, page 316, decides "that the Government may be the loser by the negligence of its officers, but never becomes bound to others for the consequence of such neglect, save by express agreement to that effect."

In Whiteside *vs.* United States, 93 United States, 247, special agents of the Treasury were authorized to collect abandoned or captured property and to make contracts with others to this end and to pay not exceeding 25 per cent. of proceeds in full compensation. It was held that the agent had no power to bind the Government to pay *50 per cent.*, nor to pay a sum of $17,356 for expenses, when no condemnation or sale resulted from the seizure.

Moffat *versus* United States, 112 United States, 24, is especially distinguished from United States *versus* Throckmorton and Vance *versus* Burbank.

The most casual examination of these authorities will show that they are based upon public policy—the theory that it would be against the public interest to subject the United States to suits for damages in cases where its officers or employés by the commission of unauthorized acts, breaches of contract, or torts, inflict injury or loss upon others.

They do not decide, however, that the United States shall take advantage of the laches of its officers to relieve itself of losses resulting from their actions, not induced by the fraud, misrepresentation, or mistakes of other parties to the transaction, or to impose such loss upon others; nor can they for one moment be regarded as authority for the proposition that the Government will be relieved of responsibility for the mistake or unwise exercise of discretionary power committed

or exercised by its counsel in open court in the trial of an adversary and litigated cause. The counsel in such case is not merely the agent of the Government; he is also an officer of the court in which he pleads the cause of his client. He is under oath to discharge his duty with fidelity as well to the court as to his client. If he knows of any reason why by virtue of his limited power or otherwise he should not consent to a judgment being taken, or to any other action in the cause which may be required of him, it is his duty to disclose it.

In the case at bar there is no charge that the district attorney was corrupted or misbehaved in his office. Every presumption, therefore, should be in his favor. He must be presumed to have acted with the utmost fidelity to his client and to the court. Having done this, the client is bound by his action.

Respectfully submitted.

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